Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1713

JOSEPH P. KENDALL,
Petitioner,

v.

BETHLEHEM STEEL CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Joseph P. Kendall, the Petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the

United States Court of Appeals for the Fourth Circuit entered in the above-entitled case, on January 26, 1977.

OPINIONS BELOW

The Opinion of The Circuit Court is unreported. The case Number is 76–1454 and it is printed in the Appendix hereto, Page A. 3 . The Decisions of the United States Department of Labor Benefits Review Board and the Decisions of the Administrative Law Judges are printed in the Appendix, at Pages A.5 – A.40.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 26, 1977, and, on March 4, 1977, an Order was entered denying a timely Petition for Re-Hearing. (A. 2). The jurisdiction of the Supreme Court is invoked under 28 U.S.C., 1254 (1) and 28 U.S.C. 2350 (a).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This petition involves the due process clause of the U.S. Constitution Fifth Amendment, which provides that no person shall be "... deprived of life, liberty or property without due process of law;", and the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. 901, *et. seq.*, relevant portions of which are contained in the Appendix accompanying this petition.

QUESTIONS PRESENTED

1. Did not the lower Court fail to apply the standard of review prescribed by this Court in *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, and reverse the Benefits Review Board's final decision, as unsupported by substantial evidence on the record considered as a whole, where the Board concluded in its first decision that a denial of compensation could not be founded on the Claimant's post-injury earnings and work activities, under Section 908 (h) of the Longshoremen's and Harbor Worker's Compensation Act, and on the self-same record, in its second decision, concluded to the contrary.

2. Was not the Benefits Review Board's initial finding and conclusion that Kendall's post-injury earnings and work activities did not fairly and reasonably represent his wage-earning capacity binding on the Board, under the principle of *res judicata*.

3. Did not the lower Court err in failing to order the Benefits Review Board to grant compensation, upon the presumption that the claim falls within the Act, pursuant to Section 920 (a) and, construing the Act in accord with its humanitarian purpose, resolve factual doubts in favor of the Claimant, and in a way to avoid harsh and incongruous results.

4. Were not the Claimant's due process rights violated by the failure of the Board to order a hearing *de novo*, where, after remand, a second administrative law judge, substituted for the first, without a hearing, retried the entire case, resolved credibility issues and conflicts in testimony

and, without notice, exceeded the order of remand and contradicted the Board's findings and conclusions in its remand decision.

5. Is not the decision of the Court below violative of Sections 902 (10) and Section 908 (21) of the Longshoremen's and Harbor Workers' Compensation Act, by holding, in effect, that so long as Claimant could return to his job as a rigger, it is immaterial for purposes of determining permanent partial disability, that he is physically unable to do the higher paying job of crane operator by reason of his compensable injury.

STATEMENT OF THE CASE

Pursuant to 33 U.S.C. 921 (c), the Court below affirmed an Order of the United States Department of Labor Benefits Review Board, which denied claimant's claim for permanent partial disability, under the Longshoremen's and Harbor Worker's Compensation Act of 1972, 33 U.S.C. 901, et seq., hereinafter sometimes referred to as "The Act." In the second of two Decisions, the Board affirmed a Decision and Order of an Administrative Law Judge, concluding that claimant suffered no economic disability as a result of his back injury, resultant disc surgery and a conceded disability of at least 15%.

The claimant suffered a compensable injury to his back, while working for Bethlehem Steel Corporation on September 27, 1969. After claimant sustained nine months of temporary total disability, including recovery from operative removal of a ruptured intervertebral disc, a Federal Deputy Commissioner recommended a permanent partial

disability award based on a 20% loss of wage earning capacity, on July 14, 1973, pursuant to Section 908 (c) (21) of The Act.

Bethlehem refused to accept this recommendation, and the case was tried by Administrative Law Judge Benn, on December 5, 1973, who rejected claimant's claim in a written Decision and Order (A.35). Benn's legal conclusion was that the claimant suffered no "disability" within the meaning of Section 908 (c) (21) Section 902 (10) of the Act, in the sense of loss of wage-earning capacity, because claimant's income increased, after his re-employment and "fairly represented" the claimant's post-injury "wage-earning capacity" under Section 908 (h). In back injury cases, under Section 8 (c) (21) of the Act, compensation Awards are made, based on the difference between claimant's average weekly wages, prior to the injury and "his wage earning capacity thereafter in the same employment or otherwise." Vital to this Petition is the following Section of the Act, which legally determine the determination of "wage-earning capacity," following injury in this class of cases, under Section 908 (c) (21).

This is determined by Section 908 (h) of the Act and by the proviso contained therein, viz:

> "The wage-earning capacity of the injured employee in cases of partial disability under Sub-divisions (c) (21) of this Section . . . shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* that if the employee has no actual earnings, or his actual earnings do not fairly and reasonably represent his

> wage-earning capacity (the Administrative Law Judge) may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard for the nature of his injury, the degree of physical impairments, his usual employment and any other factors or circumstances in the case, which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future."

Since, under Administrative Law Judge Benn's Decision, he found and concluded under Section 908 (h), that Kendall's actual earnings, post-injury, fairly and reasonably represented his wage-earning capacity, he did not fix Kendall's wage-earning capacity under the proviso of Section 908 (h).

Upon Benn's denial of compensation, based on this finding and conclusion, the Benefits Review Board reversed his Decision on Appeal, and remanded. The Board reversed Benn's finding and conclusion that Kendall's post-injury earnings fairly and reasonably represented his post-injury wage-earning capacity. The Board said: (A.32)

> "It is not disputed that petitioner sustained a permanent, 15 to 20% physical impairment of his lower back. In addition, the Record indicates that upon his return to work at the Sparrows Point Yard at Bethlehem Steel Corporation, petitioner did not perform the same arduous work he had undertaken prior to his injury. The position he accepted as groundsman on the pier is acknowledged to involve lighter work than the usual duties he had performed before the injury. Under the circumstances presented by this case,

> the Board feels that a finding should have been made as to how the petitioner's physical impairment might affect his earning capacity as it might naturally extend into the future. See Section 8 (h) of the Act, 33 U.S.C., Section 908 (h). It has been held that the possibility of future disablement, greater than that presently suffered is a factor that the Act directs to be taken into consideration, in determining wage-earning capacity . . . .
>
> In determining the possible future economic effects of petitioner's physical impairment, the wage-earning capacity may be tested by an assumption that his present employer would dispense with his services, requiring him to secure employment in the competitive labor market . . . The effect of petitioner's impairment on his ability to secure gainful employment in the open labor market, at the same wage that he had been earning prior to his accident should be determined. A claimant is entitled to a liberal construction of the Act and doubt should be resolved in his favor.

The Administrative Law Judge relied heavily on *Owens v. Traynor*, (274 F. Supp. 770 (D.C. Md. 1966), Aff'd 396 F.2d 783 (CA 4, 1968). It should be noted that, although in that case, the Court of Appeals affirmed the finding of no loss of wage-earning capacity, the panel recognized that the claimant had performed relatively sedentary engineering duties. In the case before the Board, the claimant's duties involve the arduous labor of a rigger. The effects of physical impairment on wage-earning capacity may be quite different in these two situations.

> This case is remanded to the Administrative Law Judge for re-evaluation of the petitioner's wage-earning capacity, considering the type of work petitioner performed prior to his injury, the possible effect of his physical impairment on his ability to continue to do such heavy work, and his prospects if he were forced to seek similar employment on the open labor market."

The Board, by its appellate powers, prescribed by Section 921 (b), (3), (4), thus reversed the findings and conclusions of the Administrative Law Judge that claimant performed his work well after his return to work following his injury, and that his post-injury earnings fairly and reasonably represented his wage-earning capacity, under 908 (h).

After Remand, Benn retired and the case was re-assigned, twice, finally to Administrative Law Judge George A. Fath.

Fath went entirely beyond the scope of Remand. In denying the claim for the second time, he reinstated the findings of Benn, which had been set aside by the Benefits Review Board. Without holding a hearing, he reviewed the entire proceeding and made detailed findings of fact thereon, uniformly resolving against the claimant all matters of credibility or inferences to be drawn therefrom. In a detailed Decision, he found the claimant's Petition for Review which had been already considered and granted by the Board, and which resulted in the Remand, "unreliable" "inaccurate" and "misleading". (This, after the Board had exercised its appellate power, under Section 921 (b) (3), which provides that "The Board's Orders shall be based upon the hearing record . . . ") Fath declared " . . . generally,

as a whole, the case is lacking in candor." He ignored all admissions by Bethlehem Steel Corporation's witnesses, including the critical one of its physician-employee to the effect that if the claimant were to apply to him as a new employee, he would not hire him on an unrestricted basis, without a waiver.[1] He did not apply the "Open Market" standard The Board had ordered Benn to apply on Remand.

On Claimant's second Appeal to the Benefits Review Board, the Fath Decision was affirmed. The Board held that the Fath Decision did not exceed the scope of the Remand Order, that Administrative Law Judge Fath, rather than the Board, could make credibility findings on the Record, if Administrative Law Judge Benn was unavailable to the Agency. The Board blinked Fath's *failure* to apply the "open market" standard which the Administrative Law Judge had been directed to apply on Remand, saying that it was only a useful guide. It further affirmed Fath's finding and conclusion that Kendall's real motive in turning down the higher paid work of a crane operator after his injury was because he was gregarious and did not want to stay in the crane for eight hours, even though Kendall and his doctor had both testified, without contradiction, that he was unable to climb the ladder to the crane, or sit in it for eight hours. (Nowhere in the entire record is there any evidence to support this Fath finding and conclusion, nor to contradict the testimony of Kendall and his operating, Board Certified neurosurgeon, that he was unable to do the

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[1] A waiver may be required of employees who have been previously injured, as a condition to their being hired initially under Maryland Workmen's Compensation Law, *Michie Code, Article 101*, Section 36 (b).

climbing involved in the crane operator job.) The Board said "The Administrative Law Judge, charged with the *determinations of credibility*, chose not to believe that physical inability was the reason . . . " (Emphasis supplied). It should be borne in mind that Fath held no hearing and saw no witnesses; (Petitioner maintains that this, under the circumstances was a denial of his due process rights, U. S. Constitution, Fifth Amendment.)

In place of its previous finding and conclusion that, "In addition, the record indicates that upon his return to work . . . petitioner did not perform the same arduous work he had undertaken prior to his injury. The position he accepted as a groundsman on the pier is acknowledged to involve lighter work than the usual duties he had performed before the injury", the Board found in its second Decision, in affirming Fath, "employer's doctor, certified in occupational medicine, testified that claimant is able to perform the work of a rigger, and that claimant *was not given any light-duty work in recognition of a disability on his return to work after the injury.*" Thus, the Board contradicted and reversed its own findings of fact and conclusions of law in favor of those of its subordinate Administrative Law Judge, whose findings, like the Board's findings, were based only on the Record, without an opportunity to see and hear the witnesses testify.

The Board went outside the Record to conclude that the fact that, if claimant were to be considered for hiring as a new employee, after having the company physician examine him, he would not be hired on an unrestricted basis, without a waiver, was not "conclusive" because "many Union contracts do not permit preemployment physical examinations." This make-weight is not only

outside the Record, but Kendall submitted to two examinations by the employers physician after he was re-employed, and the Plant physician did not demur when asked to posit such an examination in determining whether Kendall would be hired on an open-market basis, when claimant's attorney cross-examined him at the hearing.

The United States Court of Appeals for the Fourth Circuit's entire *Per Curiam* Opinion is set forth, as follows:

> "Joseph P. Kendall appeals the Decision of the Benefits Review Board denying his claim for permanent partial disability under the Longshoremen's and Harborworkers' Compensation Act of 1972, 33 U.S.C. 901.
>
> Kendall injured his back while working as a rigger. After recuperating from an operation on his back, he returned to work on the pier. He became a Union steward. Then he successfully campaigned for the job of Union president. After being Union president, Kendall became a Local Representative of the AFL–CIO to the Baltimore Area Council on Alcoholism.
>
> We find there is substantial evidence on the whole Record to support the Board's conclusion that Kendall could return to his job as a Rigger, without a loss in his earning capacity if he should lose his job as representative to the Council on Alcoholism. There is evidence that, while working on the graving dock, after his return to work, Kendall performed tasks similar to those he performed prior to the injury. His earnings since the injury have always exceeded his earnings before the injury. *Affirmed.*

REASONS FOR GRANTING WRIT

The Longshoremen's and Harborworkers' Act is, of course, national in scope, being based on the admiralty jurisdiction power contained in The Federal Constitution. The Act is also of a remedial humanitarian nature and should be construed liberally to effectuate its purpose and, "in a way which avoids harsh and incongruous results." *Voris v. Eikel*, 74 S.Ct. 88, 346 U.S. 328; *Pillsbury v. United Engineering Co.*, 72 S.Ct. 223, 342 U.S. 197; *O'Keefe v. Smith*, 380 U.S. 359.

However, in the class of cases at bar, i.e. back injuries or non-scheduled injuries under Section 908 (c) (21), where loss of wage-earning capacity must be fixed under 8 (h) and its proviso, as opposed to scheduled-member cases, where the compensation for loss of a member is numerically fixed in the Statute, under Section 8 (c) (1) through (20), the Act is not administered uniformly nationally throughout the Federal Appellate Circuits and the result, as here, is "harsh and incongruous".

In the Fourth and Fifth Circuits, cases involving proved and admitted anatomical disability are uncompensated, because in practice higher post-injury earnings result *ipso facto* in denial of benefits, in those Circuits. e.g., *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1967, Thomsen, J., aff'd) 396 F.2d 783 (CA 4, 1968), *cert. den.*, 393 U.S. 962; *Welch v. Leavey*, 397 F.2d 189 (CA 5, 1968), *cert. den.*, 393 U.S. 1049 (1969). The rule in other Federal Circuits is to the contrary. *Southern Steamship v. Norton*, (CA 3), 101 F.2d 825; *California Ship Service Co. v. Pillsbury*, (CA 9), 176 F.2d 783; *Travellers Insurance Company v. McClellan* (CA 2), 288 F.2d 250; *Lumbermen's*

Mutual Casualty Co. v. O'Keefe, (CA 2), 217 F.2d 720; *Twin Harbor v. Marshall*, (CA 9), 103 F.2d 513, 515, *United Engineering Co. v. Pillsbury*, 92 F. Supp. 898, 187 F.2d 987, Aff'd, 342 U.S. 197, 72 S.Ct. 223; *Portland Stevedoring Co. v. Johnson*, (CA 9), 442 F.2d 411, *American Mut. Ins. Co. of Boston v. Jones*, (A.A., D.C.) 426 F.2d 1263, 138 U.S. App. D.C. 269.

This Court should resolve the conflict between the Fourth and Fifth Circuits, on the one hand and, the Second, Third, Ninth, and District of Columbia Circuits on the other, by explicitly declaring the law to be as set forth in Sections 902 (10) and 908 (c) (21), as construed in the *Norton* and *Twin Harbor* cases, supra, i.e. not only are increased earnings post-injury not the test, but so long as the compensable injury impairs claimant's physical ability to work at any occupation for which he was qualified before injury, a loss of wage-earning capacity follows and compensation is granted. Thus, in *Norton* though claimant could earn the same amount both before and after injury as a trucker; his physical inability to stow in the hold, as he could before injury, required an award.

So, too, in *Marshall*, claimant's remaining able to perform supervisory work at the same wage, did not prevent an award where general longshoreman's work was foreclosed by the injury. Obviously, as the *Marshall* Court said, if it held otherwise, the purpose of the Act could be defeated by the employer's promoting a claimant to sedentary but higher paid work after his injury so as to avoid an award, then firing the claimant after Limitations runs.

Here, claimant has persistently maintained that construing the Act literally as the Third and Ninth Circuits

did in *Norton* and *Marshall* will avoid this result. Claimant argues, as follows:

Section 902 (10) of The Act provides:

"Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or *any other employment.*" Section 908 (c) (21) states that claimant shall be compensated for the difference between his wages prior to injury and "his wage-earning capacity thereafter in the same employment *or otherwise.*"

"Any other employment" and "same employment *or otherwise*" means any other employment of which claimant was capable before injury – not as The Fourth Circuit implies in this case – any other employment the claimant can find post-injury. The latter construction defeats the purpose of the Statute, as *Norton* and *Marshall* hold. Here, claimant is deprived of an Award, because of his earnings increased from non-strenuous Union employment, first as a shop steward, a position he held at the graving dock and, afterward, as Union president and representative to the Baltimore Area Alcoholism Council. The loss of the crane operator position because of claimant's disability, claimant contends, was erroneously ignored on the plainly "irrational"[2] basis that claimant refused it because he was "gregarious" and even though both claimant and his physician testified, without contradiction, that he was physically unable to perform it. Yet, this is the very "other

[2] This Court has held that fact findings under the Act cannot stand, if they are "irrational". *O'Keefe v. Smith*, 380 U.S. 359, 362.

employment", within the meaning of Section 902 (10) and Section 908 (c) (21), for which claimant is now disabled and for which a compensation award is compelled by the Statute under The *Norton* and *Marshall* rule. This Court should determine the legal construction of the Statute and resolve the conflict between the Federal Appellate Circuits, based on the two differeing views.

The interpretation of The Act by the Fourth Circuit Court is also at odds with the statutory presumption that the claimant's claim falls within the Act, Section 920 (a), *cf. American Stevedores v. Salzano*, (CA 2), 538 F.2d 93, 935, 936 and the "settled rule that the Act is to be construed with a view toward its beneficient purposes. Doubts, including the factual, are to be resolved in favor of the employee . . ." *Evening Star v. Kemp*, (D.C. Cir.) 533 F.2d 1224, 1227; *Friend v. Britten*, (D.C., Cir.), 220 F.2d 820, 821.

Petitioner urges that since the Board found and concluded in Its First Decision, that Kendall's post-injury earnings and work activities were legally insufficient to base a denial of compensation, when the Board reversed that finding in Its Second Decision, It not only violated the precept of *res judicata, U.S. v. Utah Construction Co.*, 384 U.S. 394, 421, 86 S. Ct. 1545, 1559, but deprived its final Decision of support by substantial evidence on the Record, as a whole, *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 488, *Overton Park v. Volpe*, 401 U.S. 416.

The *In camera* findings of the second Administrative Law Judge Fath cannot, petitioner submits, strengthen the final result. These resolved credibility findings without demeaner observation in open hearing, where no Record

basis exists. Since claimant had no notice a re-trial would occur because of the limited scope of the Remand Order, (also violated), claimant had no opportunity to request, further Hearing. Claimant's due process rights, he submits, were trampled by this Kangaroo Court proceeding. See 2, *Davis Administrative Law Treatise*, Section 11.18, P. 113, *Appalachian Power Company v. F.P.C.*, 328 F.2d 237, 240, *Cert. den.*, 379 U.S. 829, 85 S. Ct. 59; *Van Teslaar v. Bender*, 365 F. Supp. 1007, (U.S.D.C., D.C. Md., Miller, J.) *Estate of MacCrowe v. Comm'r*, (CA 4), 264 F.2d 621, 623; *Art National Manufacturer's Distributing Co. v. F.T.C.*, (CA 2), 298 F.2d 476, 477, *Gamble-Skogmo, Inc., et al. v. F.T.C.*, (CA 8), 211 F.2d 106.

CONCLUSION

If this Court intends to hold that an administrative agency may, in the same case, reach opposite conclusions from the same record and still pass the substantial evidence test, by the independent Court canvass of the record required by *Universal Camera, supra*, the Court should say so explicitly.

If the Court means to hold that so long as an injured claimant maintains or acquires any trade or occupation that would yield his pre-injury earnings he has suffered no disability and is entitled to no compensation, no matter how much he is crippled from engaging in other trades for which he was fit, the Court should say so.

Finally, if claimant must brook a trial by one Hearing Examiner who The Agency says misconstrued the evidence, and misapplied the law, and a second Hearing Examiner

who on Remand violates and ignores The Agency's Findings, decides the case without hearing, resolving all facts against claimant and rejecting all inferences favorable to claimant, if all this constitutes due process, and conforms with this Court's precedents[3], this Court should say so.

All of the above issues were tendered for Decision to the Court below, and not decided although they are material.

Petitioner prays, for the foregoing reasons, that certiorari issue to secure uniformity of interpretation of the Act, nationally, and to correct the denial of due process in this case.

Respectfully submitted,

Harry Goldman Jr.

HARRY GOLDMAN, JR.
Attorney for Joseph P. Kendall, Petitioner

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[3] *Voris v. Eikel, supra; O'Keefe v. Smith, supra.*

APPENDIX

Supreme Court, U. S.
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ORDER DENYING PETITION FOR REHEARING
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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 76–1454

Joseph, P. Kendall,
Petitioner,

versus

Bethlehem Steel Corporation,
Respondent.

ORDER

Upon consideration of the petition for rehearing, and with the concurrence of Judge Craven and Judge Hall,

IT IS ORDERED that the petition be, and the same is hereby, denied.

FOR THE COURT

/s/ (illegible) F. Haynsworth
Chief Judge, Fourth Circuit

March 2, 1977

OPINION BELOW *PER CURIAM*, UNPUBLISHED
Decided January 26, 1977

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 76–1454

Joseph P. Kendall,
Petitioner,

versus

Bethlehem Steel Corporation,
Respondent.

On Petition for Review of an Order
of the Benefits Review Board.

Argued December 7, 1976 Decided January 26, 1977

Before HAYNSWORTH, Chief Judge,
CRAVEN and HALL, Circuit Judges

Harry Goldman, Jr. for Petitioner; Thomas E. Cinnamond (Rudolph L. Rose, Semmes, Bowen & Semmes on brief) for Respondent.

PER CURIAM:

Joseph P. Kendall appeals the decision of the Benefits Review Board denying his claim for permanent partial disability under the Longshoremen's and Harbor Workers' Compensation Act of 1972, 33 U.S.C. 901.

Kendall injured his back while working as a rigger. After recuperating from an operation on his back, he returned to work on the pier. He became a union steward. Then he successfully campaigned for the job of union president. After being union president, Kendall became a local representative of the AFL-CIO to the Baltimore Area Council on Alcoholism.

We find that there is substantial evidence on the whole record to support the Board's conclusion that Kendall could return to his job as a rigger without a loss in earning capacity if he should lose his job as representative to the Council on Alcoholism. There is evidence that, while working on the graving dock after his return to work, Kendall performed tasks similar to those he performed prior to the injury. His earnings since the injury have always exceeded his earnings before the injury.

AFFIRMED.

OPINION OF BENEFITS REVIEW BOARD
Filed February 26, 1976

U.S. DEPARTMENT OF LABOR
Benefits Review Board
Washington, D.C. 20210

JOSEPH P. KENDALL,
Claimant-Petitioner,

v.

BETHLEHEM STEEL CORPORATION,
Employer-Respondent

BRB No. 75–205

DECISION

Filed as Part of the Record
February 26, 1976

Appeal from Decision and Order of George A. Fath, Administrative Law Judge, United States Department of Labor.

Harry Goldman, Jr., Baltimore, Maryland, for the claimant.

Thomas E. Cinnamond (Semmes, Bowen & Semmes), Baltimore, Maryland, for the employer.

Bruno DiSimone (William J. Kilberg, Solicitor of Labor, Laurie M. Streeter, Associate Solicitor), Washington, D.C.,

for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson and Miller, Member.

Washington, Chairperson:

This is an appeal by the claimant from a Decision and Order (74-LHCA-15) issued in 1975 by Administrative Law Judge George A. Fath in a claim arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

On September 27, 1969, in the course of his employment as a third class rigger, claimant sustained an injury to his lower back requiring removal of a disc. Employer paid claimant compensation for temporary total disability from September 28, 1969, until June 10, 1970, plus medical expenses under Section 7 of the Act, 33 U.S.C. §907. Claimant sought compensation for permanent partial disability equivalent to a twenty percent loss of wage-earning capacity beginning June 11, 1970, and the case was heard by Administrative Law Judge Herman Benn in December 1973. He determined that the claimant failed to establish an economic disability as contemplated by the Act and therefore denied the claim for compensation in 1974 (74-LHCA-15). That denial was appealed to this Board in 1974, and the Board was asked to determine whether the finding that the petitioner has not suffered any economic disability was supported by substantial evidence in the record considered as a whole.

The Board found that the Decision was silent as to future effects of the injury on claimant's wage earning capacity. The case was remanded for evaluation of the claimant's wage earning capacity, considering the type of work he performed prior to his injury and for any possible effect of his physical impairment on his ability to continue

to do such heavy work. The administrative law judge was also to consider claimant's prospects if he were forced to seek similar employment on the open labor market. 1 BRBS 76, BRB No. 74-120 (Aug. 15, 1974).

Administrative Law Judge Fath, on remand, reaffirmed the findings of Administrative Law Judge Benn and denied the claim. [Administrative Law Judge Benn had retired from Department of Labor service].

Claimant contends on appeal that Administrative Law Judge Fath had no authority to make the determinations required by the Board's remand order alleging that determinations of wage-earning capacity, as projected into the future, depend on credibility findings which can be decided only by the original administrative law judge or, if unavailable, by this Board.

The Board disagrees with claimant's reasoning that determinations involving credibility of witnesses cannot be made by an administrative law judge who has not heard the "live testimony".

> Courts of Appeals have ruled that when a trial examiner who had heard the evidence dies or retires before preparing his report and another examiner is designated to do this, there is no denial of due process, *N.L.R.B. v. Stocker Mfg. Co.*, 185 F.2d 451, 453 (3 Cir. 1950); *Gamble-Skogmo, Inc. v. F.T.C.*, 211 F.2d 106, 113 (8 Cir. 1954). And we on our own part have recognized "that the due process clause does not require under all circumstances that factual determinations be made by the person hearing the evidence". *United States v. Vater*, 259 F.2d 667, 673 (2 Cir. 1958) (dictum). [footnote omitted].

Utica Mutual Insurance Co. v. Vincent, 375 F.2d 129, 132 (2d Cir. 1967). Accordingly, the Board finds that

Administrative Law Judge Fath had authority to make determinations involving credibility on the record.

Claimant further asserts that Administrative Law Judge Fath had no jurisdiction to determine the matter since the Chief Administrative Law Judge failed to assign the case to Administrative Law Judge Benn, allegedly still available to the agency under 5 U.S.C. §554(d) although he had retired. This is nothing more than an unsupported allegation and there is no requirement that the agency make any effort to restore an unavailable officer to status of availability. *Gamble-Skogmo v. F.T.C.*, 211 F.2d 106 (8th Cir. 1954).

Under direction of the Board on remand, Administrative Law Judge Fath reviewed the record and concluded that claimant suffered no economic disability from the injury. This conclusion is supported by the record when viewed as a whole *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1966), *aff'd*, 396 F.2d 783 (4th Cir. 1968). Administrative Law Judge Fath recognized that there is an anatomical impairment and discusses at great length the evidence he had to evaluate in order to come to his conclusion.

The record shows that after his return to work eight months after the injury, claimant worked as a groundman on the crane for over a year and then at piping work in the graving dock where he was promoted to first class rigger with a third class rigger as his helper. Claimant worked overtime, occasionally working 96 hours a week, and made more money after the injury as a rigger than before the injury. After his return to work, claimant also became more active in union participation and became a shop steward and subsequently president of the union local, a full time job. While presently working for the union, claimant is on leave of absence status with the employer.

The medical evidence clearly reflects an anatomical disability of at least 15 percent. Employer's doctor, certified

in occupational medicine, testified that claimant is able to perform the work of a rigger and that claimant was not given any light duty work in recognition of a disability on his return to work after the injury. Employer's doctor did, however, testify that given the claimant's medical history, he would not hire claimant without a waiver, but hiring someone with a waiver is not tantamount to a disability. This evidence is not conclusive as many union contracts do not permit pre-employment physical examinations.

The fact that claimant turned down a job offer as a crane operator at even higher pay because he allegedly could not climb up the ladder also is not dispositive. The administrative law judge, charged with determinations of credibility, chose not to believe that physical inability was the reason for refusing the job, but, rather, that such an isolated and sedentary job was not in keeping with claimant's active nature as is clearly shown in the record.

The record shows that after his return to work after the injury, claimant was able to perform the same work, worked long hours, made more money and received a promotion. This of course is not conclusive for a finding of no further disability, but it is indicative. *Twin Harbor Stevedoring and Tug. Co. v. Marshall*, 103 F.2d 513 (9th Cir. 1959). The Board's remand order directed that the administrative law judge consider the effect of the physical impairment on claimant's prospects on the open labor market. This point was specifically addressed by the administrative law judge, and in light of the entire record was found to be unpersuasive. Further, it is to be noted that the "open labor market" test for determining wage-earning capacity is not the sole criterion; it is a useful guide. *Lumbermen's Mutual v. O'Keeffe*, 217 F.2d 720 (2d Cir. 1954).

The Board finds that the record supports the findings of fact and conclusions of law in the Decision and Order appealed from. Administrative Law Judge Fath took on the

formidable task of evaluating the extensive and conflicting testimony in the record of this case. He recognized that doubts were to be resolved in favor of the claimant, *Friend v. Britton*, 220 F.2d 820 (D.C. Cir. 1955), and yet realized that conflicting evidence and testimony in the record do not alone imply that there are doubts to be resolved in favor of the claimant. *Melendez v. Bethlehem Steel*, 2 BRBS 395, BRB No. 75-126 (Nov. 7, 1975). He can accept or reject testimony in whole or in part and draw inferences from the record which must be accepted by this Board. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962).

The allegations of bias and prejudice against Administrative Law Judge Fath are totally unsupported by the claimant and, therefore, must be rejected by the Board.

Accordingly, the Board affirms the Decision and Order of Administrative Law Judge Fath concluding that the claimant suffers no further disability.

/s/ Ruth v. Washington,
Chairperson

I Concur: /s/ Julius Miller,
Member

Dated this 26th day of February, 1976

DECISION AND ORDER OF ADMINISTRATIVE LAW
Judge George A. Fath – Case No. 74-LHCA-15
OWCP No. 3672 – July 10, 1975

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

In the Matter of

JOSEPH P. KENDALL,
Claimant

v.

BETHLEHEM STEEL CORPORATION,
Employer

SELF–INSURED

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BEFORE: GEORGE A. FATH
Administrative Law Judge

DECISION AND ORDER

This is a claim filed by Joseph P. Kendall for compensation brought pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et seq. (hereinafter referred to as the Act) and the Rules and Regulations governing the administration of the Act, 20 C.F.R. Parts 701 and 702. The Claimant seeks compensation for permanent partial disability.

After timely notice a Formal Hearing was conducted on December 5 and 6, 1973, by the Honorable Herman T. Benn, Administrative Law Judge, at Baltimore, Maryland. The Claimant and the Employer (self insured), who were represented by Counsel, were given full opportunity to present evidence, oral argument, and briefs on the issues. The hearing was public and stenographically reported.

Statement of Proceedings

At the Formal Hearing the only controverted allegation related to the nature and extent of Claimant's disability:

> Judge Benn: Now, Counsel, according to the exhibit we just identified, it appears that the sole issue in this case, would be the nature and extent of Claimant's disability as it pertains to the Act we just identified. And all the other pertinent issues are uncontroverted Is that your understanding?
>
> Mr. Goldman: Yes, that's my understanding.
>
> Mr. Cinnamond: Yes, Your Honor . . . (Tr. 5)

The issue was fully developed by presentation of evidence directly and undirectly related to disability of Claimant. The parties submitted proposed findings of facts and conclusions of law.

On March 1, 1974, Judge Benn issued the following Order:

> "It is Hereby Ordered, that the claim for payment of compensation subsequent to June 10, 1970 under the Act is denied".

The Decision and Order was filed March 6, 1974, in the Office of the Deputy Commissioner pursuant to §702.349 of the Rules and Regulations governing the Act.

On April 3, 1974, the Claimant filed a timely Notice of Appeal. The Employer joined issue on Appeal. The Solicitor of Labor, U.S. Department of Labor, on behalf of the Director, Office of Workmen's Compensation Programs submitted a memorandum on appeal, suggesting that the Administrative Law Judge be affirmed.

The Benefits Review Board issued a decision on August 15, 1974, with directions as follows:

> "This case is remanded to the administrative law judge for reevaluation of the petitioner's wage earning capacity, considering the type of work the petitioner performed prior to his injury, the possible effect of his physical impairment on his ability to continue to do such heavy work, and his prospects if he were forced to seek similar employment on the open labor market."

A Petition for Reconsideration, filed by the employer and concurred in by the Solicitor of Labor, was considered and heard on oral argument. By Order dated September 17, 1974, the Board affirmed its decision of August 15, 1974.

The Administrative Law Judge, who presided at the formal hearing, is unavailable for action on the Order of Remand. The case is assigned to the undersigned for review, decision, and order.

Statement of Facts

Age and Martial Status

The Claimant, Joseph P. Kendall was born August 26, 1931, in Baltimore Maryland. He is married. He has a daughter by a former marriage who is married. The Claimant has no dependent children.

Education

Claimant attended many schools. He "finally wound up" at Clifton Park Junior High where he completed the eighth grade. He attended the Maritime School, Sheepshead Bay, New York, for a 30 day course in practical seamanship and graduated a boatswain's mate third class.

Employment

Claimant was employed by Standard Oil of New Jersey from 1946 until 1965 as an bodied seaman. (Tr. 18) Most of this period he worked as a deck maintenance man. He did chipping, scraping, painting, general maintenance work on deck, climbing rigging, tying up, and letting go. Along with these duties he stood regular watches.

His duties aboard ship required physical agility, endurance, and strength. The Claimant described in detail the work done, tools used, and the methods of performance. In summary, it is sufficient to say that the work required full use of the body for climbing, bending, stretching, and lifting.

The Claimant's application dated May 2, 1968, for employment with Bethlehem Steel Corporation, introduced and received into evidence as Defendant's Exhibit 1, shows employment by Humble Oil and Refining Co. – Marine Division for 18 years to February 1964.

Thereafter, Claimant managed a service station for 9 months ending in November 1965.

He again returned to sea as able bodied seaman and was so employed until he applied for a job as a rigger or painter with Bethlehem. At that time he gave "retiring from sea" as his reason for leaving the job of seaman.

Federal income tax returns for the years 1966 and 1967, the last years Claimant was employed as a seaman, show income from wages in the amounts of $7,893 and $7,527 respectively. (Complainant's Exhibit 1a and b)

As a seaman, Claimant was active in trade Union affairs. He was ship's delegate to SO (sic) Tankermen's Union, a member of its Board of Governors, and an Organizer. He was also an Organizer for Teamsters Local 866. These were nonpaying jobs in addition to his regular occupation.

In August, 1968, Claimant went to work for Bethlehem Steel Corporation, at Sparrows Point, Maryland, as a third class rigger. The job required the lifting and hanging of chain falls. These devices are equipped with hooks for attachment to heavy objects for lifting and movement. The hooks, weighing from 15 to 60 pounds, are lifted, moved and attached to the load by the rigger. He guides the chain falls for placement of the load by pulling or pushing the load.

On September 27, 1969, a Saturday, the date of the injury, Claimant was engaged in stowing spare hoses into the bow of a ship. He describes these hoses as being twenty feet long, eighteen inches in diameter and fitted with metal flanges. After being loaded onto the deck the hoses were lifted manually by the rigging gang into storage shelves. While engaged in this activity, Claimant felt something snap in his back.

The injury was reported to the supervisor. A myelogram revealed a herniated disc at L4. G. Lee Russo, M.D. performed surgery on Claimant on November 12, 1969, and removed the intervertebral disc at L4 and explored the disc at L5.

Claimant was paid compensation for temporary total disability from September 28, 1969, to June 10, 1970.

At the time of the injury, his average weekly wage was $157.33. (Tr. 23) ($8,181.16 per year)

Post Injury Employment

On his return to work on June 11, 1970, Claimant was offered and accepted a job as groundman on the crane. His duties required making sure that the area around the crane was clear when it was moving, and attaching light shackles weighing two to three pounds to machinery being loaded aboard ship.

In September of 1971, he was assigned to piping work at the Graving Dock.[1] The work was located about fifty feet below ground level and reached by gangways from ground to ship and then from the deck down through the ship by steps. While at the Graving Dock, he was promoted to first class rigger.

At the Graving Dock, Claimant had a third class rigger as a helper. He states that the helper did the running, fetching and heavy work. The chain falls used in moving the pipe weighed forty to sixty pounds. Claimant could help in the handling of these falls but, because of his injury, he was not able to lift them himself.

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[1] Graving Dock: a dry basin where ships are constructed – used instead of a way: a dry dock.

During his employment at the Graving Dock, Claimant states that the Employer complained that he was not "putting enough pipe in there". On the other hand, he maintains that he and a "green" helper were doing the work generally done by a crew of three to four men.

Claimant was assigned to other jobs while employed at the Graving Dock. His special qualifications as a seaman made him eligible for trial trips aboard ship. On these trips he acted as winchman, and on occasion handled the lines in letting go and tying up.

The evidence shows that while at the Graving Dock Claimant worked overtime – as many as 96 hours a week. In the six months he worked in 1970, he earned $7,971.52. In 1971 he earned $11,230.72 of which $10,200.00 was paid by Bethlehem and $1,030.72 was paid by the union.

In answer to a question concerning his post operative ability to do seaman and rigger jobs, the Claimant summarized his own estimate of his ability: (Tr. 51, 52)

> A. Well, if I was required to do all of the work that they expect of a first-class rigger, then I couldn't do it. On a daily basis, I could not do that heavy lifting, climbing, et cetera.
>
> Q. Tell us why not.
>
> A. For one, I don't have the strength anymore. I cannot pick or lift these heavy items that I could before. I was always very proud of my strength and it causes me great deal of – I can't pick it up for one thing, Harry.
>
> If I am standing any length of time or sitting for any length of time I become stiff and my back hurts. Periodically I make moves which

causes a sharp pain, not only in my right leg but also in my left leg. And I have adjusted my body to compensate for the problem that I am having in order to function daily.

As long as I am not picking up, lifting, or bending, I am all right.

In February 1971, Claimant became shop stewart at the Bethlehem Yard. His duties were divided between work as a first-class rigger and union business. He was paid separately for time devoted to each job at the first-class rigger rate. Subsequently, he was elected President of the union local.

That position was a full time job. He acted as the senior union person in the yard. The main physical output requirement of the union position was walking. Claimant was shop steward and union local President for two years.

At the time of the hearing, Claimant was temporarily assigned through the AFL–CIO Department of Community Services to the National Council on alcoholism as its local representative to the Baltimore area chapter on alcoholism. He was selected over three other candidates for the job. He describes this job as being without security and dependent on continued federal finding. His main physical exertion is driving. He keeps records and makes reports. The job pays him $12,000.00 per annum. Though not working for Bethlehem, he remains on leave of absence status with the option to return.

The record is not clear as to time, but Claimant was offered a job in the yard as crane operator at $.60 per hour more than the rate paid first-class rigger. He declined this offer because he felt unable to climb the ladder eighty feet to the cab and sit at the controls for eight hours a day.

Mr. Clyde Eugene Kabe, a rigging quarterman, was called as a witness by the Employer. He was Claimant's supervisor during his post injury employment at the Graving Dock. He assigned Mr. Kendall his duties the same as any other first class rigger. Kendall performed the duties as well as any man could ask. He testified that physical requirements in the work of first class and second class riggers are the same. Mr. Kabe characterized Claimant as a very good man –" . . . as good as we had down there . . ."

Frank George Gorki worked as a first class rigger in the rigging gang at the Graving Dock with Claimant. This employee testified that Claimant was a very good worker and a hard worker.

Both employees testified that they knew of no difficulties which Mr. Kendall may have had in the performance of his work at the Graving Dock. And, they stated that they did not hear him complain that he could not do the work required of him.

On November 19, 1971, Claimant reported another back injury to the Company. Claimant's Exhibit 8 contains his statement that while pulling a towing line from the tug he felt something pop in his back.

Medical – history and opinion

The Claimant has a long standing history of back complaints.

The records of Humble Oil and Refining Company show that on November 19, 1961, he was admitted to the U.S. Public Health Service Hospital in Baltimore on a complaint that "I sprained or strained my lumbo sacral (sic) area". The day after an auto pedestrian accident in Baltimore County Maryland. He was released from the hospital on November 27, 1961, and remained on Sick Leave through January 2, 1962.

Again from November 2 through November 9, 1962, Mr. Kendall was an outpatient at the same hospital on his complaint of "recurrence of back ailment sustained in auto accident 11/18/61". For this reason he was on sick leave from November 23, 1962, through January 15, 1963.

The Claimant acknowledges the above hospitalizations. However, he states that he was told at the hospital there was nothing wrong with his back. Treatment consisted of rest.

When confronted with Humble's record on cross examination, he stated it was untrue. He presented no evidence then or later in rebuttal of the facts stated in the record.

At the time Claimant applied for employment with Bethlehem, he had a claim pending for permanent total disability of a hand. Hiring was deferred pending a determination of the claim. It appears that a 10% loss of use (disability) was awarded.

In the application for employment with Bethlehem as painter or rigger, dated May 2, 1968, Claimant stated that he had no physical defects. Although there is some evidence that the hand injury was disclosed to the Employer, there is no evidence that his back problems were disclosed.

After Claimant's injury on September 27, 1969, he was examined and treated by G. Lee Russo, M.D., a neurosurgeon, of Baltimore, Maryland. Examination revealed nerve root irritation at L5-S1. After a week of conservative treatment, a myelogram was performed and it revealed a disc protrusion at the L4-L5 level.

The protruding disc was surgically removed on November 12, 1969. The L-5 space was the explored and the nerve root was seen to be under no compression there.

Claimant was discharge from the hospital on November 23, 1969, with instructions to limit activity, take davron, and return for office examination in six weeks.

Postoperatively, Claimant was followed by Dr. Russo. On June 8, 1970, Claimant was discharged from the Doctor's care to return to work with reference to his back. Claimant was next seen by Israel Weiner, M.D., an associate of Dr. Russo on December 6, 1971. According to Doctor's report of that date, Claimant's Exhibit 5, he complained of having wrenched his back at work and felt an immediate snapping sensation in his low back. He continued to work at his regular job.

On examination Dr. Weiner reported the lumbosacral spine was normal in configuration. Mobility was fairly good, with complaint of pain at extremes of bending in all directions. There was no focal neurologic deficit, in terms of motion, reflex, or sensory function. X-rays were ordered, and the Claimant, was instructed to return if his symptoms did not improve. He did not return in connection with this "flareup".

At the request of his attorney, Claimant was seen by Dr. Russo on January 12, 1973, "to evaluate Mr. Kendall for disability". In his testimony at the formal hearing, the Doctor read from his report of the examination:

> Q. Can you tell us in detail what limitation of motion of his physical performance is?
>
> A. As described in the examination, I will just read it.
>
> "The examination shows straight leg raising to be uncomfortable at about seventy to eighty degrees bilaterally, lumbar mobility is mildly limited in flexion, but extension and lateral bending are good".

Q. All right, now . . .

Mr. Cinnamond. He hasn't finished.

The Witness: That's right. The rest is negative. It says "There is no spinal tenderness, and there is no focal neurologic deficit".

Q. Now, can you tell us what effect, with a reasonable medical probability, the deficit which you report would reasonably – what effect they would reasonably be expected to have on Mr. Kendall's day to day activities.

A. It would produce moderate limitation of his ability to engage in strenuous exertion for a prolonged physical work. (Tr. 215)

The Doctor, on further questioning, agreed with counsel that the inability, described by Claimant to climb a ladder and sit in a crane all day was consistent with his estimate of disability on his examination. It was further elicited that there is nothing further that medical science can do for this man.

Dr. Russo saw Claimant again, and for the last time in September 1973. At that time he complained of back pain resulting from a strain while on vacation. Claimant was told by the Doctor to take it easy and take a little pain medicine.

By letter, dated June 25, 1970, Dr. Russo wrote to Attorney for Claimant:

> "This note is to inform you that the above named patient has retained a 20% permanent partial disability".

At the formal hearing, Dr. Russo reaffirmed his earlier estimate that the Claimant would retain a twenty percent disability in his lower back. (Tr. 214)

Robert John Brandt, M.D. of Bethlehem Steel Corporation was called as a witness for the employer. His curriculum vitae showed that he was Board Certified in Occupational Medicine. His duties at Bethlehem include "examining workers for proper placement so that they don't injure themselves or can work safely on the job".

Doctor Brandt testified from Kendall's medical records at Bethlehem.

The first examination was the pre-employment physical on May 3, 1968. The record showed that Kendall denied previous injury to the back or head.

Dr. Brandt examined Claimant on January 5, 1971. With reference to the back, Dr. Brandt stated.

> "The findings related specifically to his back complaints were the operative scar, tightness of the muscles with some flattening, he had full motion in all directions. An examination of straight leg raising was carried out to eighty degrees, and he became slightly uncomfortable from there to ninety. There was no atrophy of the quadriceps by measurement, reflexes were two plus, and there was no evidence of loss of sensation". (Tr. 302)

The Doctor was asked for and stated the duties of a rigger. He expressed the opinion that Claimant suffered a 5% anatomical loss of function. In his opinion, at the time of that examination, Kendall was able to do the work of a rigger.

On December 5, 1972, the Claimant was again examined by Doctor Brandt for an evaluation of the back problem. After conducting the same examination as the previous with slightly different results, he concluded that Claimant suffered a 15% anatomical disability. In response to the question of whether or not Kendall could work as a rigger, Dr. Brandt stated, "In my judgment I feel he could perform the duties of a rigger". Further, he stated that workers who have had back surgery are no more prone to re-injury. In his opinion there was no relationship between the original injury and the alleged reinjury claimed by Kendall in November 1971.

Comment

The foregoing overlong development of the evidence in this case is a distillation of an overlong, difficult record. Evidence pertinent to the issues had to be searched out among many irrelevancies. Too, in reciting the evidence due regard had to be given to charges that the original decision failed to consider "substantial evidence" of disability: that the evidence relied on in that decision was "shot through with contradictions and too vague", and, that pertinent evidence was ignored.

In the interest of fairness it must be noted that the argument of Claimant in support of a Petition to review is in some places inaccurate, and, in other places, it is misleading.

The argument in support of Claimant's Petition states that Dr. Brandt rated Kendall at 5% disability in June, 1970. The fact is that this evaluation was made in examination on January 5, 1971. (Tr. 300). This was elicited by Counsel for Claimant. (Tr. 307) Further, it was December 5, 1972, rather anatomical disability. (Tr. 303, 305)

At page 4 of the argument, Dr. Brandt's testimony is taken out of context and given a meaning not remotely justified by his testimony. He is quoted as saying that Kendall returned to limited work on June 11, 1970, and, from that statement, the conclusion is drawn that Bethlehem gave Kendall "sheltered employment" because of disability. The fact is that the quotation attributed to the Doctor was really the statement of Claimant given by way of a history during a physical examination. (Tr. 304)

Counsel for Claimant infers that the Company recognized Claimant's disability and gave him light duty. Actually, Counsel, on cross examination, elicited the contrary from the Doctor, "The Medical Department, essentially myself, did not give him light duty as such". (Tr. 307)

These inaccuracies and others coupled with disproportionate claims of disability and suffering make the Petition and argument for review unreliable.

Findings of Fact

The Claimant sustained an accidental injury arising out of and in the course of his employment with Bethlehem Steel Corporation on September 27, 1969, within the meaning and coverage of the Act.

Timely notice of the injury was given to the Employer.

Claimant was paid compensation for temporary total disability from September 28, 1969, to June 10, 1970. His average weekly wage was $157.33.

As the result of his injury, Claimant suffered a 15% permanent anatomical impairment of his back. This conclusion is reached on the basis of the testimony of Doctor Brandt. Estimates of impairment or disability of the back range from 5% to 20%. While Claimant was actively

engaged in work as a rigger, examination of January, 1971, showed a 5% impairment. After Claimant worked for almost two years as Union Steward and President, the impairment rose to 15% as shown by examination of December, 1972. There is doubt as to whether the increase of impairment was due to lack of activity, or to a progression of symptoms, but, since doubts are resolved in favor of the Claimant, the 15% estimate of back impairment is accepted as the fact. Dr. Russo's estimate of a 20% disability was given without adequate foundation and in an apparent attempt to be helpful, it is, therefore, rejected. Claimant's medical condition stabilized in June 1970.

After his return to work in June 1970, the Claimant was able to do all of the work required of a rigger. He worked overtime and put in as many as 96 hours per week. He received a promotion. He made more money as a rigger after his injury than he had made before.

At the time of his injury, Claimant was a rigger by occupation and profession. It is that employment rather than able bodied seaman which must be considered in determining disability. In 1968, Claimant demonstrated by word and deed that he was retired from the sea. The evidence in chief concerns the work required of a rigger and not the work required of a 42 year old man at sea. Whether the Claimant will ever return to rigging after years of public relations work with the Union is questionable, but, again, doubts must be resolved in his favor. *Friend v. Britton*. 95 U.S. App. D.C. F. Supp. 1321 (U.S.D.C. R.I. 1969)

The record amply demonstrates that the Claimant is intelligent, witty, aggressive, and learned in the ways of survival in industry. In his testimony at the hearing he was articulate and quick to grasp any opportunity to advance his position. His ability to organize and conduct union business, to advance in his job, and to change occupational direction

places him high among his peers as shown by their selection of him as a leader. The luster of these qualities is not dimmed by a lack of formal education.

Claimant contends that because of his back injury he had to refuse a crane operator's job. He stated he could not climb the eighty feet to the top of the crane and sit in the cab all day. This is a rationalization. Considering the gregarious, ambitious, aggressive, active nature of Claimant, this job was not suited to him. He chose the arduous work at the Graving Dock over the sedentary crane job. Once at the Graving Dock where he had more freedom than he would as a craneman, he began his successful campaign for Union Steward, President, and upward occupational mobility.

As a whole the case is lacking in candor.

Issue

Whether a Claimant, who suffers a permanent anatomical impairment of his back, sustains an economic disability where he is able to perform his pre-injury job, obtains promotion, and increases his earnings on that job over his pre-injury income.

Conclusions of Law

The Order of Remand requires: "... evaluation of the Petitioner's wage earning capacity considering the type work the petitioner performed prior to his injury, the possible effect of his physical impairment on his ability to continue to do such heavy work, and his prospects if he were forced to seek similar employment on the open labor market". (BRB No. 74-120)

An award of compensation is not required or authorized merely because there is some anatomical

impairment. The duty imposed is to evaluate the extent of a claimant's disability in economic rather than in medical terms. Any determination of disability must take into considration the effect of one's physical condition on his ability or capacity to earn wages. *Owens v. Traynor*, 274 F. Supp. 770 (D.C. Md. 1966), aff'd, 396 F.2d 783 (4th Cir. 1968); *Army and Air Force Exchange v. Neuman Sanders*, BRB No. 122-73 (December 28, 1973).

The 15% anatomical impairment of Claimant's back, standing alone, is not sufficient reason to award compensation. It must be shown that the medical impairment diminishes Claimant's ability to earn wages.

Applying the test for determining disability to the evidence in this case, it must be concluded that Claimant did not sustain a loss of earning capacity due to his injury. As related in the statement and findings of fact, the Claimant returned to his job as a rigger and performed outstandingly in the job. There are no medical restrictions based on the kind of work he does. At times he worked 96 hours a week of straight time and overtime. His income after his return to work as a rigger was greater after the injury than it had been before due largely to overtime. Supervisors described Claimant as a good worker. He was promoted from second-class to first class rigger at the Graving Dock. There is no evidence that he was the beneficiary of a sympathetic employer or that his job was in jeopardy because of his inability to do the work. It is reasonable to infer from the evidence that he would have been promoted to supervisor had he stayed with Bethlehem. His job with Bethlehem is still available to him.

There is no evidence that Claimant will suffer future disablement caused by the injury greater than that presently suffered. Nonetheless, in consideration of the case as a whole, it is a factor to be taken into account. *Travelers Insurance Company v. McLellan*, 288 F.2d 250 (2d Cir. 1961)

In weighing this factor, the medical evidence is the principal guide. By June 1970, nine months after the injury, the Claimant's condition had stabilized. Dr. Russo stated in June 1970, without even knowing what Claimant's work performance would be, that Claimant suffered a 20% disability. From that Doctor it was dramatically elicited that medical science had done all it could for the man. Dr. Brandt found anatomical impairment ranging from 5% to 15% between January 1971, and December 1972, with no physical restrictions on Claimant's work activities in either case. Apart from the evidence, yet another question arises out of the common experience of man. What percentage of Claimant's anatomical impairment is due to the ravages of the aging process?

It can be assumed that Claimant's return to rigging, if it ever occurs, will be a painful experience after years of sedentary employment with the Union. In that sense, he may suffer a disability much the same as a middle aged athlete faces in making a comeback. But, this disability, being the only one inferrable from the evidence, is not compensable.

In view of the conclusion that Claimant has not suffered an economic disability caused by his injury, it is unnecessary to consider formulae for calculating loss posited in *United Fruit Co. v. Cordillo*, 104 F. Supp. 81 (S.D. N.Y. 1952), and *Wiles v. New York, Chicago and St. Louis Railroad Co.*, 283 F.2d 328 (3rd Cir. 1960).

Order

It is, therefore, Ordered that the claim of Joseph P. Kendall for compensation, under the Act, be, and is hereby denied.

/s/ GEORGE A. FATH
Administrative Law Judge

Dated: July 10, 1975
Washington, D.C.

OPINION OF BENEFITS REVIEW BOARD
Filed August 15, 1974

JOSEPH P. KENDALL,
Petitioner,

v.

BETHLEHEM STEEL CORPORATION SPARROWS POINT YARD,
Respondent

BRB No. 74-120

DECISION

Appeal from Decision and Order of Herman T. Benn, Administrative Law Judge, U.S. Department of Labor.

Harry Goldman, Jr., Baltimore, Maryland, for petitioner.

Thomas E. Cinnamond (Semmes, Bowen & Semmes), Baltimore, Maryland, for respondent.

Jean S. Cooper, Washington, D.C., United States Department of Labor (William J. Kilberg, Solicitor of Labor, James G. Johnston, Associate Solicitor of Labor) for the Director, Office of Workmen's Compensation Programs, United States Department of Labor.

Before: Washington, Chairperson, and Miller, Member.*

This is an appeal by the claimant, petitioner herein, to review and set aside a decision and order denying a claim for permanent partial disability benefits and order denying a claim for permanent partial disability benefits as not in accordance with law nor supported by substantial evidence. The claim arises under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. §901 *et seq.* (hereinafter referred to as the Act).

On September 27, 1969, in the course of his employment as a rigger with the respondent, petitioner suffered an injury to his lower back. Respondent paid petitioner compensation for temporary total disability from September 28, 1969, until June 10, 1970, plus medical expenses under Section 7 of the Act, 33 U.S.C. §907.

Petitioner claimed entitlement to compensation for permanent partial disability equivalent to a twenty percent

* Member, Ralph M. Hartmen, did not participate in the decision of this case.

loss of wage-earning capacity beginning June 11, 1970, and the deputy commissioner so recommended. Respondent did not accept the deputy commissioner's recommendation. Subsequently, the case was heard by an administrative law judge in December 1973. He determined that the claimant failed to establish an economic disability as contemplated by the Act and denied the claim for compensation.

The Board is asked to determine whether the finding that the petitioner has not suffered any economic disability is supported by substantial evidence in the record considered as a whole.

The standard to be used in determining entitlement to compensation under the Act is economic disability, which is defined as a loss of wage-earning capacity resulting from physical disability. *Owens v. Traynor,* 274 F. Supp. 770 (D.C. Md. 1966), *aff'd*, 396 F.2d 783 (4th Cir. 1968); *Army and Air Force Exchange Service v. Neuman,* 278 F. Supp. 865 (W.D. La. 1967); *Suderman Stevedores v. Seab Sanders,* BRB No. 122-73 (December 28, 1973). In applying this standard, a further consideration which must be recognized is that wages actually received on returning to work after injury are indicative, but not alone determinative, of wage-earning capacity. *United Engineering Co. v. Pillsbury,* 92 F. Supp. 898 (N.D. Cal. 1950), *aff'd,* 187 F.2d 987 (9th Cir. 1951), *aff'd.* 342 U.S. 197, 72 S. Ct. 223 (1952); *Twin Harbor Stevedoring and Tug Co. v. Marshall,* 103 F.2d 513 (9th Cir. 1939).

The decision and order appealed from is silent as to whether future effects of petitioner's injury on his wage-earning capacity were considered by the administrative law judge. It is not disputed that petitioner sustained a permanent, fifteen to twenty percent physical impairment of his lower back. In addition, the record indicates that upon his return to work at the Sparrows Point Yard of Bethlehem Steel Corporation, petitioner did not perform the

same arduous work he had undertaken prior to his injury. The position he accepted as groundsman on the pier is acknowledged to involve lighter work than the usual duties he had performed before the injury. Under the circumstances presented by this case, the Board feels that a finding should have been made as to how the petitioner's physical impairment might affect his earning capacity as it might naturally extend into the future. *See* Section 8 (h) of the Act, 33 U.S.C. §908 (h). It has been held that the possibility of future disablement greater than that presently suffered is a factor that the Act directs to be taken into account in determining wage-earning capacity. *Travelers Insurance Co. v. McLellan,* 288 F.2d 250 (2d Cir. 1961).

In determining the possible future economic effects of petitioner's physical impairment, wage-earning capacity may be tested by an assumption that his present employer would dispense with his services, requiring him to secure employment in a competitive labor market. *United Fruit Co. v. Cardillo,* 104 F. Supp. 81 (S.D. N.Y. 1952). *See also, Wiles v. New York, Chicago and St. Louis Railroad Co.,* 283 F.2d 328 (3rd Cir. 1960). The effect of petitioner's impairment on his ability to secure gainful employment in the open labor market at the same wage he had been earning prior to his accident should be determined. A claimant is entitled to a liberal construction of the Act and doubts should be resolved in his favor. *Southern S. S. Co. v. Norton,* 101 F.2d 825 (3rd Cir. 1939).

The administrative law judge relied heavily on *Owens v. Traynor, supra,* in reaching his decision. It should be noted that, although in that case, the Court of Appeals affirmed the finding of no loss of wage-earning capacity, the panel recognized that the claimant had performed relatively sedentary engineering duties. In the case before the Board, the claimant's duties involve the arduous labor of a rigger. The effects of physical impairment on wage-earning capacity may be quite different in these two situations.

This case is remanded to the administrative law judge for reevaluation of the petitioner's wage earning capacity, considering the type of work the petitioner performed prior to his injury, the possible effect of his physical impairment on his ability to continue to do such heavy work, and his prospects if he were forced to seek similar employment on the open labor market.

/s/ Ruth V. Washington,
Chairperson

/s/ Julius Miller,
Member

Dated at Washington, D.C.
this fifteenth day of
August 1974.

DECISION AND ORDER OF ADMINISTRATIVE JUDGE
Signed March 1, 1974

U.S. DEPARTMENT OF LABOR
Office of Administrative Law Judges
Washington, D.C. 20210

In the Matter of

JOSEPH P. KENDALL,
Claimant

vs.

BETHLEHEM STEEL CORPORATION,
SPARROWS POINT YARD,
Employer

SELF–INSURED

Case No. 74–LHCA–15
(Formerly 3672)

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For the Employer and Carrier

Before: HERMAN T. BENN
Administrative Law Judge

DECISION AND ORDER

This case is brought pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (hereinafter referred to as the Act) and the Rules and Regulations implementing the Act.

A hearing in this case was held on December 5 and 6, 1974, in the City of Baltimore, Maryland. The parties were represented by counsel and were afforded full opportunity to adduce evidence and to examine and cross-examine witnesses. Thereafter the parties filed briefs in support of their respective positions. The said briefs and attachments are hereby made a part of the record.

Based upon the entire record in this case and from observation of the witnesses and their demeanor, the Court makes the following Findings of Fact, Conclusions of Law and Order.

Findings of Fact and Conclusions of Law

The Claimant, Joseph P. Kendall, was born on August 16, 1931, and is 42 years of age. He has an eighth grade education, and completed training at the United States Maritime Service School in Brooklyn, New York. He is married and resides with his wife and a step-daughter. Claimant graduated from said Maritime School at the age of seventeen as a boatswain's mate first class. Thereafter, from July, 1946 until January, 1968, with the exception of about nine months in 1965 when he worked as a service station manager, he was employed as a seaman, mostly on American Flag vessels.

The Claimant was employed by the Respondent, Bethlehem Steel Corporation–Sparrows Point Yard in August, 1968 as a third-class rigger. While so employed on September 27, 1969, aboard the ship Eagle Charger, but as a second-class

rigger, he was injured. His average weekly wage at the time of the injury was $157.33. Compensation for temporary total disability was paid by the Respondent at the rate of $70.00 per week from September 28, 1969 to June 10, 1970, totaling $2,560.00, plus medical expenses under Section 7 of the Act.

The Claimant's post injury work activity and earnings include the following:

(1) On June 11, 1970, the Claimant returned to his former work as a second-class rigger with the Respondent, working as a groundman on the pier. Subsequently on or about August 24, 1970, he was promoted to a first-class rigger with an increase in pay. He earned $7,971.52 in 1970 after returning to work in June, and missed no time from work during this period.

(2) In 1971, the Claimant held the position of shop steward in his union in addition to his work with the Respondent as rigger. He earned $10,200.00 for his work with the Respondent; and $1,030.72 for his work with the union in 1971.

(3) The Claimant ran for and was elected president of his union in January, 1972; and devoted full time to this position, for which he earned $8,639.15 in 1972.

(4) The Claimant's term as president of the union expired in May, 1973. He secured a more remunerative position with the Baltimore Council of Alcoholism, as of June 1, 1973, earning $12,000.00 per annum. His position with the said Council is tenuous, depending to a large extent on the outcome of refunding. However, the Respondent is holding open the position of first-class rigger for his return, if he so desires.

The position of the Claimant, in effect, is that since he has a residual anatomical impairment of the back of up to 20 percent which limits his ability to function on a sustained basis certain strenuous activity, such as is required of an able-bodied seaman, he is entitled to compensation under the Act for permanent partial disability.

The position of the Respondent is to the effect, that since the Claimant's post-injury earning capability is as much as it was prior to the injury of September 27, 1969, the Claimant is not entitled to any compensation under the provisions of the Act subsequent to June 10, 1970, having returned to work on June 11, 1970, even though there may be an anatomical impairment of his back of up to 20 percent. The issue thus raised is whether the evidence establishes that the Claimant is entitled to any compensation subsequent to June 10, 1970, on the basis of a permanent partial disability of up to 20 percent impairment of his lower back?

Economic disability rather than physical disability is the standard to be used for compensation purposes under Longshoremen's and Harbor Workers' Compensation Act. *Army and Air Force Exchange Service v. Neuman*, 278 F. Supp. 865.

The evidence that the Claimant suffers up to 15 or 20 percent impairment of his lower back as a result of the injury hereinvolved is uncontradicted. However it is also true that the evidence establishes that the Claimant received as much or more in wages subsequent to the injury as prior to his said job related injury. "Disability" means incapacity because of injury to *earn* the wages which the employee was receiving *at the time of injury* in the same or any other employment, 33 U.S.C. 902 (10).

It is true that an employee's actual earnings after he returns to work do not conclusively prove his wage-earning capacity. The employer may be willing to allow the claimant to

return to his old job although the claimant is unable to do all of the work connected therewith and would be handicapped in obtaining another job by his disability. On the other hand, the claimant may be earning less than he did before the accident not because of any disability resulting from the accident but because of economic conditions or some infirmity not caused or aggravated by the injury. *Owens v. Traynor*, 274 F. Supp. 770.

The evidence here establishes that the Claimant returned to his former job on June 11, 1970 as second-class rigger. He worked as groundman on the pier. The testimony of the Claimant as well as two of his coworkers including a supervisor established that the Claimant performed his duties well. In fact he was promoted to first-class rigger in August, 1970 which involved an increase in pay.

The court therefore finds that the income received by the Claimant after he returned to work on June 11, 1970 fairly represents his post-injury "earning capacity."

The Longshoremen's Act does not permit the award of compensation for permanent partial disability aside from scheduled disability unless there has been some loss of wage-earning capacity, *Owens v. Traynor, supra.*

The evidence establishes that the Claimant's post-injury earning capacity is as much, indeed exceeds, his pre-injury earnings. Therefore no "economic disability" as contemplated under the Act has been established.

The Claimant's contention that since his job-related injury resulted in an impairment which precludes him from engaging in certain occupations, including his former work as an able-bodied seaman, he is "disabled" within the meaning of the Act is without merit. Section 2 (10) (33 U.S.C. 902 (10) of the Act provides: "Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

According to the statement included in the transcript at page 325, Section 702.132 of Title 20 of the Code of Federal Regulations, which involves the procedure for the approval of attorney fees, was called to the attention of counsel for the Claimant. However no application has been filed pursuant to said regulation. Therefore no fee is being approved in respect to this case.

Order

It Is Hereby Ordered, that the claim for payment of compensation subsequent to June 10, 1970 under the Act is denied.

Signed at Washington, D.C. this 1st day of March, 1974.

/s/ HERMAN T. BENN
Administrative Law Judge

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1972

33 U.S.C. 901, et seq.

An Act To provide compensation for disability or death resulting from injury to employees in certain maritime employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

Sec. 1. This Act may be cited as "Longshoremen's and Harbor Workers' Compensation Act."

DEFINITIONS

Sec. 2. When used in this Act –

* * * * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

* * * * * * *

COMPENSATION FOR DISABILITY

Sec. 8. Compensation for disability shall be paid to the employee as follows:

* * * * * * *

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section respectively and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation or loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $3,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: In all other cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

* * * * * * *

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivisions (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * * * * * *

PROCEDURE IN RESPECT OF CLAIMS

Sec. 19.

* * * * * * *

(d) Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.

* * * * * * *

PRESUMPTIONS

Sec. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary –

(a) That the claim comes within the provisions of this Act.

* * * * * * *

REVIEW OF COMPENSATION ORDER

Sec. 21.

* * * * * * *

(b)(1) There is hereby established a Benefits Review Board which shall be composed of three members appointed

by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman.

(2) For the purpose of carrying out its functions under this Act, two members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

* * * * * * *

Supreme Court, U. S.
FILED
JUN 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1713

JOSEPH P. KENDALL,

Petitioner,

v.

BETHLEHEM STEEL CORPORATION-
SPARROWS POINT YARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF BETHLEHEM STEEL CORPORATION-SPARROWS POINT YARD IN OPPOSITION TO PETITION

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IN THE

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BETHLEHEM STEEL CORPORATION-
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BRIEF OF BETHLEHEM STEEL CORPORATION-SPARROWS POINT YARD IN OPPOSITION TO PETITION

OPINIONS BELOW

The unpublished per curiam opinion of the United States Court of Appeals for the Fourth Circuit[1] affirmed the Order of the Benefits Review Board (A. 5-10), which in turn had affirmed the Decision and Order of the Administrative Law Judges below, that the Claimant suffered no further disability (A. 11-30, 35-40), under the

[1] The Opinion is set forth in the Petitioner's Appendix (A. 3-4).

Longshoremen's and Harbor Workers' Compensation Act.[2]

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 26, 1977, and the Petition for Certiorari was not filed within 90 days thereafter, as required by 28 U.S.C. §§1254(1), 2350(a). The Petitioner did not seek a stay of the mandate of the Fourth Circuit pending the Petition for Rehearing, which Petition was summarily denied by the Fourth Circuit on March 4, 1977 (A. 2).

Four successive determinations by two Administrative Law Judges, the Benefits Review Board and the United States Court of Appeals for the Fourth Circuit have reiterated that Kendall did not sustain a loss of wage-earning capacity and that the denial of compensation in this case was clearly supported by substantial and overwhelming evidence[3] in the record considered as a whole. Therefore, he was not entitled to permanent partial disability benefits under the Longshoremen's and Harbor Workers' Compensation Act.

The United States Court of Appeals for the Fourth Circuit, which received extensive briefs and heard oral argument, concluded from its independent review of the

[2] Codified in 44 Stat. 1424, 33 U.S.C.A. §§901 *et seq., as amended* in 1972 ("the Act" or "LHWCA"); references herein are to Code sections, but it will be observed that the Code sections are the statute sections codified in a 900 series in the United States Code Annotated.

[3] Although there are various allegations and arguments contained within the Petition for Writ of Certiorari, filed herein, the thrust of the Petition simply indicates disagreement with the factual determinations below, which were sustained at each successive level of review, and is an obvious effort to involve this Court in an independent and impermissible *de novo* review of the sufficiency of the evidence.

record that the decision of the Board denying the claim should be affirmed and that the merits of the case were so clearly supported by substantial evidence in the record below that a pro forma per curiam opinion would suffice (A. 4). They gave the Petitioner the shortest shrift in denying his Petition for Rehearing (A. 2).

The subject Petition is based upon misstatements of fact and misinterpretations of law of such import that the Petition is unreliable, inaccurate, misleading and totally lacking in candor.[4] Moreover, the Petition involves primarily the sufficiency of the evidence presented below and seeks to have this Court reweigh that evidence and reach factual determinations contrary to those made below and affirmed by the Fourth Circuit. The Petition herein does not present a question of conflict amongst circuits or a question of national importance. Thus, the Petition should be denied for failure to state or to present sufficient grounds for review by this Court. Rule 19, Supreme Court Rules.

QUESTION PRESENTED

Throughout this case, the Employer and Self-Insurer has successfully proven that the Claimant's anatomical impairment was not accompanied by a loss of wage-earning capacity and, therefore, that the employee has not suffered a disability compensable under the Longshoremen's and Harbor Workers' Compensation Act.[5] May this Court now reweigh and review the sufficiency of that evidence?

[4] The inaccuracies are to a large degree the same as presented below and commented upon by Administrative Law Judge Fath in his Decision and Order (A. 24-25, 27).

[5] 33 U.S.C. §§902(10), 908(c)(21). *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1967), *aff'd*, 396 F.2d 783 (4th Cir. 1968), *cert. denied*, 393 U.S. 962; *Welch v. Leavey*, 397 F.2d 189 (5th Cir. 1968), *cert. denied*, 393 U.S. 1049.

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.*, portions of which are contained in the Petitioner's Appendix (A. 40-45).[6]

STATEMENT OF THE CASE

The Petitioner (Employee-Claimant), Joseph P. Kendall, was injured on September 27, 1969. He filed a claim for Workmen's Compensation benefits under the LHWCA. The claim was contested from the Employer. After two days of hearings and after receipt of detailed briefs by the respective counsel, Administrative Law Judge Herman T. Benn denied the claim and found no loss of wage-earning capacity, *i.e.*, no "economic disability" as required under the Act (A. 39).

The Claimant appealed to the Benefits Review Board, which, on August 15, 1974, did not reverse the Decision of Judge Benn and did not question or modify his Findings of Fact, as the Petitioner erroneously contends,[7] but remanded the case for clarification on the narrow ground of whether Judge Benn had considered the possible future effects of the Claimant's injury on his wage-earning capacity (A. 32). Judge Benn retired and, in accordance with Administrative Law Judge procedures, with the request of the Petitioner's attorney the case was reassigned. Administrative Law Judge George A. Fath reviewed the transcript of testimony and exhibits in an exhaustive Opinion and Order (A. 11-30), which concluded that the evidence sustained Judge Benn's earlier determination that the claim

[6] The Act also provides for Appellate review of final Orders of the Benefits Review Board. 33 U.S.C. §921(c).

[7] The Petitioner erroneously argues before this Court that the Board's initial Order reversed Judge Benn and found as fact that the Claimant suffered disability (P. Br. 6-8). Therefore, the Petitioner's first, second and fourth questions presented to this Court are based on erroneous factual and legal predicates and are without merit (P. Br. 3-4).

should be denied. The Claimant again appealed to the Benefits Review Board, which, after oral argument, concluded that the record as a whole supported the finding that "the Claimant suffers no further disability." (A. 10). Thus, the claim was again denied. The third appeal was taken to the United States Court of Appeals for the Fourth Circuit, which received extensive briefs, reviewed the record, heard oral argument thereon and determined that there was substantial evidence to support denial of the subject claim (A. 4). A Petition for Rehearing by the Fourth Circuit was summarily denied (A. 2).

The Petitioner now seeks a fourth appellate review of the sufficiency of the evidence in the record considered as a whole, which in effect would require this Court to conduct an impermissible *de novo* reweighing of the evidence. Thus, the Petition is improper, without merit and should be denied.

STATEMENT OF FACTS

The Respondent will limit its Statement of Facts to correction and amplification of the Petitioner's Statement:

The Respondent accepts and refers this Court to the Findings of Fact of Administratve Law Judges Benn (A. 36-37) and Fath (A. 25-26). The Claimant, while working as a second-class rigger aboard ship on September 27, 1969, at a $157.33 average weekly wage, sustained an accidental injury to his back within the ambit of the Act.

Kendall had a long history of back problems prior to beginning work for Bethlehem Steel Corporation in 1968.[8] The evidence presented at the hearing before

[8] At the time of the hearing before Judge Benn, on December 4-5, 1974, Kendall was reluctant to admit to any prior back problems, until he was confronted on cross-examination with the appropriate medical records.

Judge Benn was that the employee was promoted to a second-class rigger on November 12, 1968, in which capacity he was injured on September 27, 1969. After care and treatment, the Claimant was released by his treating doctor and discharged with instructons to return to his work activities without any qualifications or restrictions. The Claimant returned to his second-class rigger duties at the Pier and did not lose any time from work, worked substantial periods of overtime and earned more than he had ever earned prior to his injury. Throughout his post-injury employment, this Claimant advanced himself by seeking better and more economically rewarding jobs until, at the time of the hearing before Judge Benn, he was earning more than he had ever made before and was working in a more prestigious occupation than he had ever held before. Moreover, his job security was greatly enhanced by Bethlehem Steel's willingness to keep the Claimant's rigger job open for him pending his return from his most recent executive position, as local representative to the Baltimore Area Chapter on Alcoholism in the AFL-CIO Department of Community Services to the National Council on Alcoholism, a $12,000.00 a year job.

Faced with the overwhelming evidence of a laudatory improvement by the Claimant in his working position and earnings ability, the Petitioner's attorney erroneously suggests that the Findings of Fact of Judge Benn that the Claimant had not sustained a loss of wage-earning capacity were reversed by the Benefits Review Board.[9] The Board did not question, modify or reverse Judge Benn's Findings of Fact, but merely requested a clarification as to whether the possible future effects of the injury had been presented and considered below (A. 32). Therefore, the Board expressly *remanded* the case

[9] See footnote 7, as to the Petitioner's misstatement of the Board's Order.

to the Administrative Law Judges, which, of course, was not a reversal of the findings below or of the decision denying compensation benefits.

Judge Benn retired and, in accordance with the Department of Labor Procedures, with the request of the Claimant's attorney the case was reassigned. Administrative Law Judge George A. Fath thoroughly reviewed the transcript of testimony and exhibits in his Decision, which concluded that the evidence sustained Judge Benn's earlier determination that the employee did not suffer economic disability under the Act, *i.e.* Kendall had no loss of wage-earning capacity (A. 28). The claim was again denied. Of course, the Petitioner's attorney did not object to the reassignment of Administrative Law Judges, since he had requested the same. His untimely challenge to the Administrative procedures did not arise until after he had received the claim denied decision of Judge Fath. The very procedures which he requested, he now characterizes as a "Kangaroo Court." (P. Br. 16). Obviously, this belated, desperate challenge to the Administrative procedures has not been properly presented below or preserved for Appeal, but, rather, has been waived.

The employee took a second Appeal to the Benefits Review Board, which, after a thorough review of the sufficiency of the evidence, complimented Judge Fath for his exhaustive review of the record and concluded that the record as a whole supported the finding that the "claimant suffers no further disability." (A. 10). The Claimant appealed to the United States Court of Appeals for the Fourth Circuit, which again reviewed the sufficiency of the evidence and affirmed denial of the claim below (A. 4). In a last tenacious gambit, dehors judgment, the Petitioner seeks to have this Court conduct an impermissible *de novo* reweighing of the sufficiency of the evidence presented below. Certainly,

this is not within the scope of this Court's certiorari jurisdiction.

REASONS FOR DENIAL OF WRIT OF CERTIORARI

The law is clear that the decision of the Administrative Law Judge, if supported by substantial evidence on the record as a whole, must be affirmed. Moreover, review of the sufficiency of the evidence is a matter for the lower courts and certainly is not an appropriate matter for this Court's exercise of certiorari. There is no need to reiterate the substantial and overwhelming evidence as to the Claimant's dramatic earnings rise in the years following his return to work, since this is undisputed and clearly establishes that his post-injury performance far exceeded his pre-injury occupation, earnings and earning ability. Therefore, it is clear from the facts and the law that Kendall's claim for compensation benefits under the Act was properly denied at each stage of the proceedings below.

Nor is there any conflict amongst the circuits as to the appropriate standard to be applied to determine disability under the Act. Although different facts may lead to different decisions on whether or not to award compensation benefits in any particular case, this case does not present any conflict which the Supreme Court should resolve. Therefore, the Petition must be denied.

The Petitioner's attorney attempts to cloud the real issue in the case, *i.e.*, sufficiency, as set forth above, by desperately and belatedly attacking the very remand procedure which he requested and expedited. The Petitioner's attorney never made any timely objection to the reassignment procedure, which he requested, nor requested a *de novo* hearing. It was only after he became dissatisfied with Judge Fath's Decision and Order that

the Petitioner complained of the procedures he requested. The conduct of the Petitioner's counsel clearly constitutes: an express consent to substitution of Administrative Law Judges; waiver of any objection to the procedures for reassignment; and waiver of any arguable necessity for a *de novo* hearing. Notwithstanding waiver, there has been no showing of substantial prejudice to the Claimant. *Venn v. Todd Shipyards Corp.*, 2 BRBS 86, 90 (1975). *See Arthur Murray Studio of Wash. v. FTC*, 458 F.2d 622, 624 (5th Cir. 1972); *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 37, 73 S. Ct. 67, 69, 97 L. Ed. 54 (1952).

Judge Benn, who heard the evidence and saw the witnesses, had made Findings of Fact sufficient to decide the case; Judge Fath was asked merely to clarify the extent of Judge Benn's Decision. The substitution of Judge Fath was in accordance with the Administrative Procedure Act, 5 U.S.C. §554 (1966), and the due process guarantee of the Fifth Amendment to the United States Constitution. The procedures on remand were precipitated by actions of the Petitioner's counsel, with his full understanding and appreciation and with his express agreement thereto. These procedures were entirely proper and well within the scope of the Board's Order on remand. The clarification of the record, made by Judge Fath, strictly followed the Board's directions and was entirely proper and supported by substantial evidence in the record considered as a whole.

Therefore, denial of the Kendall claim for compensation is supported by substantial evidence on the record as a whole and is procedurally unassailable. The subject Petition is without merit and should be summarily denied.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the subject Petition for Writ of Certiorari should be denied as improper and unnecessary and without the scope of this Court's jurisdiction.

Respectfully submitted,

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